Case No. 82-1335

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

JAMES A. RHODES, et al.,

Petitioners,

vs.

LARRY STEWART,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION TO CERTIORARI

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REPLY ARGUMENT IN SUPPORT OF CERTIORARI

The questions posed by the petitioners are:

1) Is an award of attorneys' fees made to a plaintiff pursuant to 42 U.S.C. Section 1988 proper where the plaintiff has not prevailed as a practical matter?

2) Is an award of attorneys' fees made pursuant to 42 U.S.C. Section 1988 proper where there has been no adjudication of a present right or proscription of a present wrong?

3) Should the plaintiff be allowed attorneys' fees for all the time spent litigating a matter where he prevails in only a fraction of his claims and receives only part of the relief requested?

Respondent's brief in opposition to certiorari suggests that the respondent continuously appealed the ban on "Hustler Magazine " from May, 1976 to August, 1978; that he appealed to the petitioners; that the appeal was continuously denied; and that the petitioners disregarded Ohio Administrative Code Section 5120-9-19 (A-42) in deciding his appeal. The impression left by respondent's brief is unsupported by the record.

On page 1 of his brief, the respondent claims that he made his desire to receive "Hustler Magazine" known to the petitioners in May, 1976; that he was denied permission; that the denial was arbitrary; and that he was denied a proper appeal under Section 5120-9-19. The record shows that the magazine was banned from Ohio's prisons in May,

1976 under former Administrative Regulation 814. (A-22) The respondent alleged that he made his desire to receive the magazine known for the first and only time on June 15, 1977 (A-37) to unnamed employees of the state, not to the petitioners. The respondent has never appealed the ban to the petitioners pursuant to Section 5120-9-19; nor has any Ohio prisoner requested permission to receive "Hustler Magazine" since May, 1976. The petitioners have never ignored Section 5120-9-19 in banning "Hustler Magazine". They have never reviewed "Hustler Magazine" under Section 5120-9-19 because neither the respondent nor any other Ohio prisoner has requested a review since January 1, 1977, the effective date of the section.

The respondent's claim that he has won a right to receive "Hustler Magazine" through his litigation is false. The respondent has gained no such right; the right to appeal was granted by the enactment of Section 5120-9-19. At most, his case has resulted in a declaratory judgment that Section 5120-9-19 meets constitutional standards and should be used to determine whether or not "Hustler Magazine" should be permitted inside Ohio's prisons. The only finding adverse to the petitioners was that "Hustler Magazine" was banned seven (7) months before the enactment of Section 5120-9-19.

The petitioners might claim that they have prevailed. The petitioners were not ordered to allow state prisoners access to "Hustler Magazine". Their regulation was held to be constitutional (A-30), and the respondent was directed to file an appeal (A-13); an action he has never taken. The district court's order did not create a right, proscribe a wrong, or enhance the enjoyment of a right. The order simply informed the respondent that he, along with all Ohio prisoners, had enjoyed an opportunity to appeal the ban on "Hustler Magazine" since January 1, 1977 and directed him to follow the proper procedure in his appeal.

The parties were left in the same positions they occupied on the date suit was filed.

The confusion surrounding the grant of attorneys' fees continues. The United States Court of Appeals for the Sixth Circuit has further confused the issue. In this case, an award of attorneys' fees based on nothing more than a declaratory judgment that the regulation in question, a regulation adopted a year before suit was filed, was constitutionally sound and should be followed was affirmed. There was no finding that the respondent had been denied a right. In a later case, *Othen* v. *Ann Arbor School Board*, 699 F. 2d 309 (6th Cir. 1983), the same court affirmed a denial of fees, stating:

> If, as a matter of fact, the lawsuit was not causally related to securing the relief obtained, the plaintiff was not a "prevailing party." *Id.* at 313;

and:

> If the requesting party has not prevailed in fact, that is the end of the matter. While the Civil Rights Attorney Fee Act was designed to provide compensation for attorneys who undertake legal action to vindicate the civil rights of groups and individuals, the "prevailing party" requirement forbids the award of fees where no benefit accrues from the action. *Id.* at 314.

Here, as in *Othen*, no benefit accrued from respondent's suit and the enactment of Section 5120-9-19 was not causally related to the respondent's action.

Certiorari should be granted to give definitive guidance to the federal judiciary in determining the existence of a prevailing party in the context of 42 U.S.C. Section 1988.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served on the respondent by forwarding such copies to Larry J. McClatchey, Brownfield, Bowen and Bally, 140 East Town Street, Columbus, Ohio 43215, by United States mail, postpaid, this _____ day of MAY, 1983. I further certify that all parties required to be served have been served.

ALLEN P. ADLER
Assistant Attorney General